SUPREME COURT, U. S.

FILED

No. 73-858

In the Supreme Court of the United States

OCTOBER TERM, 1973

ALFREDO GONZALEZ, individually and on behalf of all others similarly situated,

Appellant,

vs.

AUTOMATIC EMPLOYEES CREDIT UNION, MERCANTILE NATIONAL BANK OF CHICAGO, CAR CREDIT CORP., OVERLAND BOND & INVESTMENT CORP. and WOOD ACCEPTANCE CORP., individually and as representatives of all others similarly situated, and MICHAEL J. HOWLETT, Successor to JOHN W. LEWIS, Secretary of State,

Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE MERCANTILE NATIONAL BANK OF CHICAGO

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STATUTES INVOLVED

All statutes relevant to this appeal have been reprinted in the appendices to Brief for the Appellant (Pl. Br.) except for § 9-507 of the Illinois Uniform Commercial Code (Ill.Rev.Stat. ch. 26, § 9-507), which is set forth in Appendix A at App. 1.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction on direct appeal of a three judge district court's dismissal of an action for mootness and lack of standing?
2. Whether this action presents a case or controversy when the repossession complained of has already taken place and the automobile concerned has been sold to a person not a party to the litigation and when plaintiff's damage claims have been settled?
3. Whether a litigant possesses standing to contest the constitutionality of the self-help repossession provisions of the Uniform Commerce Code when he failed to obtain redress under the Code for the violation of those provisions?

STATEMENT OF THE CASE.

This appeal is the sole remnant of a concerted effort to strike down both the self-help repossession provisions of the Uniform Commercial Code and provisions of the Illinois Vehicle Code relating to the issuance of repossession certificates of title for automobiles. From an inadequate record counsel for appellant Alfredo Gonzalez have vainly struggled to construct a case or controversy which would require the court below to decide a constitutional question affecting a carefully structured uniform law regulating chattel security adopted in 49 states, the District of Columbia and the Virgin Islands.

In an effort to make it appear that a concrete and substantial controversy still exists between the parties, Mr. Gonzalez emphasizes the broad nature of the constitutional declarations and relief he would like to obtain and glosses over the procedural history of this action, to which

he belatedly became a party. Accordingly, it is necessary to review the record of this case both before and after he became a party, even though Mr. Gonzalez is the only one of the four named plaintiffs below who is now pursuing this appeal.[1]

The Original Mojica Lawsuit

On March 16, 1972, ten days after the repossession of his automobile, Hermogenes Mojica filed a lawsuit against the repossessing creditor, Automatic Employees Credit Union ("Credit Union"), and the Illinois Secretary of State. Mr. Mojica asserted that he had met when due every weekly payment on the automobile and had made the last payment three days before its repossession. Count I of his Complaint alleged that §§ 9-503 and 9-504 of the Uniform Commercial Code were unconstitutional and prayed for declaratory and injunctive relief against the Credit Union. Count III claimed $30,000 in compensatory and punitive damages from the Credit Union on the same constitutional grounds. Unlike Counts I and III, which were both brought individually, Count II was pleaded on behalf of the class of all persons whose motor vehicles were repossessed without prior notice or hearing. Count II sought sweeping declaratory and injunctive relief against the Illinois Secretary of State. (A. 7-15.)

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[1]All named plaintiffs other than Mr. Gonzalez, and all named defendants other than Mercantile and the Secretary of State, settled with each other prior to the decision of the district court and are no longer directly involved in the litigation. Plaintiffs Mojica, Barnett and Banks, and defendants Automatic Employees Credit Union, Car Credit Corp. and Overland Bond & Investment Corp. and Wood Acceptance Corp. have so notified the Clerk of this Court.

On March 30, 1972, after suit was filed, the Credit Union resold Mr. Mojica's automobile to a third party not involved in this litigation.[2] Although Mr. Mojica received notice of the intended resale, he did nothing to stop it.

More than two months elapsed after the resale before Mr. Mojica pressed for any form of injunctive relief. On June 21, 1972, he filed a motion for a temporary restraining order. Since his automobile had already been sold to a third party and he had made no effort to stop the resale, his motion sought no specific relief for himself but requested an injunction for the benefit of the alleged class of plaintiffs restraining the Secretary of State from issuing a repossession certificate of title after an involuntary repossession of an automobile until the owner-debtor had been given a hearing. (A. 16-17.)[3]

The Secretary of State's New Procedure

At the request of the court below (Judge Austin), the Secretary of State, on July 3, 1972, filed Suggestions in Opposition to Entry of Temporary Restraining Order. Disclaiming any interest in the impact of a temporary restraining order upon creditor institutions engaged in automobile financing, the Secretary of State proposed a new procedure to meet the objections of Mr. Mojica's counsel

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[2] Affidavit of R. J. Diefendorf, attached as Exhibit C to Joint Memorandum of All Creditor Defendants in Opposition to Motion to Proceed as a Plaintiffs' and Defendants' Class Action in Count I (filed January 2, 1973).

[3] By the time this motion for temporary restraining order was filed by Mr. Mojica, the Secretary of State had already issued to Mercantile a new certificate of title to the automobile repossessed from the appellant—Mr. Gonzalez. (A. 48, 51.)

and to obviate the need for a temporary restraining order and consequent delays which might result from the appeal of such an order. (A. 18-20.)

Up to July, 1972, the Secretary of State had been following a procedure of issuing repossession certificates of title on the application of a creditor supported by an affidavit stating that the debtor's interest in the automobile had been terminated pursuant to the provisions of a valid contract.[4] Under the new procedure proposed by the Secretary of State, an application by the repossessing creditor for a repossession certificate of title must include an affidavit of the creditor stating that the debtor was mailed notice of the transfer 15 days prior to the submission of the application. The notice of transfer must inform the debtor of his right to file an affidavit of defense with the creditor contesting the assertion that his interest was lawfully terminated or sold pursuant to the terms of the security agreement. The affidavit submitted by the creditor to the Secretary must affirm that the creditor has not received such an affidavit of defense from the debtor. The Secretary will refuse to issue a repossession certificate of title if the required affidavit is not supplied by the creditor or if the affidavit discloses that the creditor has received an affidavit of defense from the debtor. However, a repossession certificate of title will be issued, even though an affidavit of defense has been filed, if the creditor's affidavit contains a certified copy of a court order (except a judgment by confession) declaring

[4] This was the procedure followed in June with respect to the certificate of title for the automobile repossessed from the appellant—Mr. Gonzalez.

the creditor to be entitled to possession and title of the automobile. (A. 18-20.)

At a hearing held by the court below on July 7, 1972, counsel for Mr. Mojica (who is also counsel for Mr. Gonzalez on this appeal) expressed his approval of the Secretary of State's proposal, but insisted upon the additional requirement that a copy of the notice to the debtor be attached to the creditor's affidavit. With the Secretary's concurrence, the court accepted this amendment to his proposal and denied the temporary restraining order in view of the agreement reached by counsel. The Secretary indicated to the court that the proposal would be implemented (effective August 6, 1972) in the form of an administrative policy to be promulgated by press release and notice to all creditors. Counsel for Mr. Mojica indicated no objection to this method of implementation of the Secretary's proposal.[5]

Mr. Gonzalez Sues the Secretary of State and Mercantile National Bank—September 28, 1972

Several months after the entry of this agreed order on July 7 and the effective date of the Secretary of State's new procedure on August 6, Mr. Gonzalez joined this litigation as an additional party plaintiff in a new and greatly expanded Amended Complaint filed September 28, 1972. The Amended Complaint added three plaintiffs (including Mr. Gonzalez) and four defendants including Mercantile National Bank of Chicago ("Mercantile"). Count I, asserting the unconstitutionality of the Code's self-help repossession provisions and seeking declaratory and injunctive relief against creditors, was pleaded as

[5] Transcript of Proceedings, pp. 5-28 (July 7, 1972).

both a plaintiffs' and defendants' class action.[6] Count II of the Amended Complaint sought declaratory and injunctive relief against the Illinois Secretary of State, including an injunction restraining the Secretary from issuing a repossession certificate of title to a transferee after an involuntary repossession and from issuing special repossession license plates to those in the business of repossessing motor vehicles.[7] In Count IV, Mr. Gonzalez sought compensatory and punitive damages of $62,000 against Mercantile. Other counts of the Amended Complaint did not involve either Mr. Gonzalez or Mercantile. (A. 23-36.)

Events Concerning Mr. Gonzalez's Claim

Mr. Gonzalez entered into a retail installment contract with Chicago, Illinois Motor Sales, Inc. ("Motor

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[6] The class of plaintiffs allegedly included:

"all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed for an alleged default, without prior notice or an opportunity to be heard."

The class of defendants was described as including:

"all persons who are secured parties within the meaning of Ill. Rev. Stat. ch. 26, §9-105(i) and who may, upon their unilateral determination of default by debtor-obligees, seek to recover possession and dispose of the collateral governed by such security agreements pursuant to and under color of Illinois Revised Statutes ch. 26, §9-503 and 4." (A. 24-25.)

[7] Count II was pleaded on behalf of the class of plaintiffs described as follows:

"all persons who are debtors under security agreements involving motor vehicles and who have had or may have their automobiles or other motor vehicles repossessed and sold for an alleged default without prior notice and an opportunity to be heard and whose certificate of title has been or will be terminated and transferred by the Secretary of State." (A. 31.)

Sales") on January 22, 1972. To purchase a used 1968 Pontiac, he agreed to pay 15 monthly installments of $120.78 each, beginning on February 28, 1972. The amount financed pursuant to the contract also included physical damage and collision insurance, of which the holder of the contract was named as beneficiary. The contract further provided that upon the occurrence of an event of default, the holder of the contract had the right "to take immediate possession of the motor vehicle, with or without judicial process." (A. 26-27, 37-38.)

Shortly after Mr. Gonzalez signed this contract, Motor Sales assigned it to Mercantile. On March 26 and April 16, 1972, Mr. Gonzalez damaged the automobile in two separate accidents. Following these accidents, Mercantile, as the holder of the retail installment contract, received $322.68 in payment of physical damage and collision insurance. Two days after Mr. Gonzalez's second accident, the insurance company cancelled this insurance and sent Mercantile a rebate of $229.94. (A. 26-27.)

The Amended Complaint alleged that on or about April 25, 1972, Mercantile repossessed Mr. Gonzalez's automobile and that at the time of repossession Mercantile had received an amount in excess of the payments then due and owing on the contract. (A. 27, 43.) Mercantile's Answer alleged that on June 7, 1972, Mercantile sent to Mr. Gonzalez, by certified mail, return receipt requested, a notice that the automobile would be sold to Motor Sales for the amount Mr. Gonzalez owed Mercantile on the retail installment contract. (A. 44.) Three days prior to the sale, on June 16, 1972, the Illinois Secretary of State (pursuant to the procedure then used by that office) issued a repossession certificate of title to Mercantile on the basis of Mercantile's affidavit concerning the repossession.

(A. 48, 51.) On August 15, 1972, Motor Sales sold the automobile to Henry L. Davis. (A. 52.) Mr. Gonzalez took no action to prevent the issuance of the certificate of title to Mercantile or the successive sales to Motor Sales and Davis. Neither Motor Sales nor Davis was ever joined as a party to this litigation. At no time in this litigation has Mr. Gonzalez sought to recover the automobile from Mr. Davis or to secure a declaration that he, rather than Mr. Davis, is the owner of the automobile.

Settlement of Mr. Gonzalez's Damage Claim

The only specific relief sought by Mr. Gonzalez with respect to this transaction was the recovery of damages from Mercantile in the claimed amount of $62,000. (Amended Complaint, Count IV, A. 35-36.)

On December 28, 1973, Mr. Gonzalez and Mercantile entered into a stipulation that the amount of damages to be recovered under Count IV could not exceed $750. (A. 54-55.) Subsequently that amount was tendered to and accepted by Mr. Gonzalez. (Pl. Br. pp. 6, 53-54.)

The Decision of the District Court

On August 16, 1973, the three-judge court dismissed the case on the basis of lack of standing to sue and mootness.[8] The district court's decision is adequately summarized at Pl. Br., pp. 6-7. The district court also held that because the named plaintiffs (including Mr. Gonzalez) lacked standing themselves, they could not represent other members of the alleged class. Accordingly, the district court denied plaintiffs the right to bring this suit as a class action.

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[8] Jurisdictional Statement, Appendix A.

Of the four named plaintiffs, only Mr. Gonzalez appealed. On February 25, 1974, this Court entered an order postponing a decision on jurisdiction.

SUMMARY OF ARGUMENT

I. Jurisdiction

Mr. Gonzalez argues broadly that once a three judge court is convened on the basis of a complaint formally seeking to enjoin a state officer's enforcement of a state statute on Federal constitutional grounds, a direct appeal to this Court from a judgment of the three judge court is always proper unless the judgment was based upon a conclusion that the constitutional claim was plainly insubstantial. This argument ignores recent controlling decisions of this Court dismissing direct appeals from decisions of three judge courts where the cases have become moot. *Rosado* v. *Wyman,* 395 U.S. 826 (1969); *Falkner* v. *Ferguson,* 414 U.S. 806 (1973). Direct appeals to this Court are no longer available where a three judge court dismisses a case on grounds such as mootness and lack of standing. 9 Moore's Federal Practice, §110.03[3], at p. 77 (1973).

Mr. Gonzalez relies on 28 U.S.C. §1253 to establish this Court's jurisdiction. Because this special jurisdictional provision operates as "a serious drain upon the Federal judicial system" which "dislocates" its normal functioning, it must be strictly construed. *Phillips* v. *United States,* 312 U.S. 246, 250-51 (1941). Section 1253 was designed to protect a state statute from "improvident doom" at the hands of a federal court. *Id.* Mr. Gonzalez would skirt intermediate review of procedural issues by a court of appeals in order to hasten his desired demise of a state statute—thereby subverting the underlying purpose of Section 1253.

The issuance of a repossession title by the Secretary of State has no substantive effect on the rights of debtors such as Mr. Gonzalez. Ill.Rev.Stat. ch. 95½ (1971), §3-114 (c). The sole purpose of suing the Secretary of State was to obtain the convening of a three judge court. Since the Secretary of State is only a nominal defendant whose action "is not the effective means of the enforcement or execution of the challenged statute," a three judge court should not have been convened pursuant to 28 U.S.C. §2281 and this direct appeal should be dismissed. *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers*, 387 U.S. 97, 102 (1967).

II. Mootness

At the moment Mr. Gonzalez joined this litigation, his claims for injunctive and declaratory relief did not present a case or controversy. By reason of Mr. Gonzalez's delay in seeking judicial redress and his failure to join the purchasers of the automobile as parties, no injunctive or declaratory relief could have been awarded which would have afforded Mr. Gonzalez any redress or effective relief for the wrongs he allegedly suffered.

Mr. Gonzalez's claim against the Secretary of State was further mooted when the Secretary of State adopted a new procedure for issuance of repossession titles drastically different from the procedure used when Mr. Gonzalez's automobile was repossessed and resold. Mr. Gonzales would not have suffered any injury at the hands of the Secretary of State if this new procedure had been in effect when his car was repossessed and sold.

Mr. Gonzalez's claim for declaratory relief is moot because the facts alleged, under all the circumstances, show that there is no substantial controversy between parties having adverse legal interests of sufficient immediacy and

reality to warrant the issuance of a declaratory judgment. *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969). For this case or controversy to recur between these parties, Mr. Gonzalez will have to purchase a new car on a retail installment contract with Mercantile that does not have a provision requiring a hearing prior to repossession and he will have to default again on his loan payments. So remote a possibility of recurrence cannot save an otherwise mooted claim. *Oil Workers Union* v. *Missouri*, 361 U.S. 363 (1960); *Harris* v. *Battle*, 348 U.S. 803 (1954); *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir. 1972), *vacated* 409 U.S. 815 (1972); *Kerrigan* v. *Boucher*, 450 F.2d 487 (2d Cir. 1971). Furthermore, no matter how remote the continuing controversy between Mr. Gonzalez and the Secretary of State, it is clear that the new procedures adopted by the Secretary of State with the approval of plaintiff's counsel, render this case moot. *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972).

The fact that this case was originally filed as a class action cannot be used to salvage this litigation. If Mr. Gonzalez, as the only named plaintiff prosecuting this appeal, cannot establish the requisite case or controversy with defendants, he may not seek relief on behalf of himself or any other member of the class. *O'Shea* v. *Littleton*, ... U.S. ....., 94 S.Ct. 669, 675 (1974); *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973); *Dillard* v. *Industrial Commission of Virginia*, 409 U.S. 238 (1972).

When Mr. Gonzalez's claim against Mercantile for monetary damages was settled by payment of $750 to Mr. Gonzalez, the only viable claim he retained at the time he became a party to this litigation was rendered moot.

III. Standing

Mr. Gonzalez was injured, if at all, by the violation of the Uniform Commercial Code repossession provisions and his failure to seek the protection provided by the Code against such violations. Section 9-503 permits the creditor to repossess only when the debtor is in default. In his Amended Complaint Mr. Gonzalez alleged that he was not in default when his car was repossessed. For purposes of ruling on the motion to dismiss, the district court properly accepted the allegations pleaded in Mr. Gonzalez's Amended Complaint at face value and assumed that he was not in default at the time of the car's repossession. *California Transport* v. *Trucking Unlimited,* 404 U.S. 508, 515 (1972). Although Mr. Gonzalez received reasonable notice of Mercantile's intention to dispose of the car, Mr. Gonzalez made no effort to restrain resale of the car pursuant to § 9-507 of the Code. Mr. Gonzalez suffered the "irreparable" harm of the loss of his automobile only because of his own inaction.

Mr. Gonzalez attacks the constitutionality of a statute, the operation of which has not caused him injury. To the contrary, he was protected by the statute and and suffered injury only because of his own failure to seek the protection of that statute. Because Mr. Gonzalez had not been injured by the operation of that statute, he has no standing to challenge its constitutionality. *Schlesinger* v. *Reservists Committee to Stop the War,* ..... U.S. ....., 42 U.S.L.W. 5088, 5092 (June 25, 1974); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 165-71 (1972).

This Court has cautioned against "the adoption of an inflexible constitutional rule" on the necessity of a hearing prior to repossession pursuant to §§9-503 and 9-504 of the Code. *Mitchell* v. *W. T. Grant Co.,* ..... U.S. ....., 94 S.Ct. 1895, 1906 (1974). Accordingly, the District Court was correct in avoiding a decision on the constitutionality of the Code's repossession provisions when those provisions had been violated and plaintiff had failed to seek injunctive relief expressly authorized by §9-507 of the Code.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

(Reply to Plaintiff's Brief, pp. 14-35)

Mr. Gonzalez contends that 28 U.S.C. §1253 requires this Court to accept direct review of the decision of the three judge court below dismissing this action for mootness and lack of standing. Section 1253 provides for direct review by this Court of the grant or denial, after notice and hearing, of an injunction in any proceeding required to be heard by a three judge court. Section 2281 requires that an injunction to restrain a state officer's execution of a state statute be heard by a district court composed of three judges.[1]

A. Section 1253 confers no right of direct appeal to this Court where the court below based dismissal on mootness and lack of standing.

Mr. Gonzalez argues broadly that once a three judge court is convened on the basis of a complaint formally seeking to enjoin a state officer's enforcement of a state statute on Federal constitutional grounds, a direct appeal to this Court from a judgment of that three judge court is always proper unless the judgment was based upon a conclusion that the constitutional claim was plainly insubstantial. (Pl. Br., pp. 14-15.) Mr. Gonzalez treats this proposition as "explicitly rejected" and "completely foreclosed" by decisions of this Court. (Pl. Br., p. 14.) Hav-

[1] Both statutes are reprinted in Pl. Br., App. A.

ing summarily disposed of this issue, Mr. Gonzalez devotes virtually all of his jurisdictional argument (Pl. Br., pp. 15-35) to his assertion that his constitutional claim against the Secretary of State is substantial and that this Court has pendent jurisdiction over his claims against Mercantile. As a result, Mr. Gonzalez virtually ignores Mercantile's principal jurisdictional argument—that Section 1253 does not authorize direct appeals to this Court from judgments dismissing cases for mootness or lack of standing.

To reach the conclusion that this Court has jurisdiction on direct appeal whenever the constitutional question presented is substantial, Mr. Gonzalez argues (1) that a direct appeal lies from any decision by a three judge court unless this Court determines as a matter of law that the three judge court was improperly convened; and (2) that in any case in which the complaint formally seeks to enjoin a state official from enforcing a statute of statewide application, this Court could find the three judge court improperly convened and dismiss the appeal only by concluding that the complaint raised plainly insubstantial constitutional issues. Both of these contentions are wrong.

Contrary to Mr. Gonzalez's assertions, the decisions of this Court establish a number of grounds for concluding that a three judge court was improperly convened aside from the insubstantiality of the asserted constitutional question. These grounds include an absence of standing to sue and mootness existing at the outset of the litigation —i.e., a lack of a case or controversy. Furthermore, this Court's jurisdiction to entertain an appeal from a decision of a three judge court depends upon the grounds upon which that decision was based, not the correctness of the decision on the merits. Finally, even though a three

judge court was properly convened in the first instance, subsequent events such as mootness may properly terminate the case in a way which does not give rise to a direct appeal under § 1253.

Mr. Gonzalez's jurisdictional theorems fail to account for a large number of decisions by this Court. For example, where a three judge court was properly convened but only a declaratory judgment was granted by the three judges, this Court has held that the losing party does not enjoy a right of direct appeal to this Court. *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970).

More specifically in point—and dispositive of the case at bar—are the decisions of this Court which have denied direct appeals in cases where the lower court dismissed the action for mootness. In *Rosado* v. *Wyman*, 395 U.S. 826 (1969), a three judge court was convened in a case attacking a New York statute on constitutional and nonconstitutional grounds. Thereafter the state statute was amended. The district court held that the amendment mooted the challenge to the original statute and that a challenge to the statute, as amended, lacked "ripeness." *Rosado* v. *Wyman*, 304 F.Supp. 1354 (E.D.N.Y. 1969). This Court dismissed the attempted direct appeal. Similarly, in *Falkner* v. *Ferguson*, 414 U.S. 806 (1973), a three judge court held that repeal of a state statute rendered the portion of the complaint challenging the statute moot. This Court dismissed the attempted direct appeal. *See also, Mengelkoch* v. *Industrial Welfare Commission*, 393 U.S. 83 (1968); *Wilson* v. *City of Port Lavaca*, 391 U.S. 352 (1968); *Mitchell* v. *Donovan*, 398 U.S. 427 (1970).

On the basis of this line of cases, Professor Moore has concluded that direct appeals are no longer available where a three judge court dissolves itself or dismisses a

case on grounds such as mootness and lack of standing. 9 Moore's Federal Practice, § 110.03[3] at p. 77 (1973). Citing the same cases relied upon by Mr. Gonzalez to illustrate the Court's acceptance of direct appeals from judgments dismissing actions for lack of case or controversy and standing, Professor Moore asserts that the Court will not continue to accept direct appeals in such cases.[2]

The rule precluding direct appeal of a three judge court's dismissal for mootness and lack of standing finds strong support in the legislative history and policy reflected in the jurisdictional statutes on which Mr. Gonzalez relies. In cases dismissed for mootness there is either an arguable absence of a case or controversy from the beginning or else subsequent events have rendered the controversy academic. In cases dismissed for lack of standing to sue, there is a serious question whether the plaintiff has the requisite personal interest to present the issue in a

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[2] Of the cases cited in Pl. Br., pp. 14-15, only *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 541 (1972), discusses the propriety of direct appeals from decisions of three judge courts which are not based upon the merits of the constitutional claim. *Lynch* involved a dismissal for lack of subject matter jurisdiction, a matter involving considerations different from those present in a case involving dismissal on grounds of mootness or lack of standing.

In other cases cited by Mr. Gonzalez in which the lower court decision did not reach the merits, the propriety of direct appeal was not discussed. *Baker* v. *Carr*, 369 U.S. 186 (1962); *American Trial Lawyers Association* v. *New Jersey Supreme Court*, 409 U.S. 467 (1973); *Zwickler* v. *Koota*, 389 U.S. 241 (1967); and *Flast* v. *Cohen*, 392 U.S. 83 (1968). In *Flast* v. *Cohen*, the Court discussed the propriety of the convening of the three judge court but not the question of whether a dismissal for lack of standing is directly appealable to this Court.

sharp and distinct manner. In these kinds of cases, allowance of a direct appeal would require this Court to spend its valuable time on cases which are either clearly moot or nonjusticiable or on cases in which the existence of a case or controversy is at best a "borderline" matter.

There is nothing in the policy behind the three judge court statutes which requires direct appeal in such cases. These statutes are intended to provide the safeguards of two additional judges and direct appeal in order to prevent the "improvident doom" of a state statute by a single federal judge. *Phillips* v. *United States,* 312 U.S. 246, 251 (1941). This Court has repeatedly held that §1253 of the statutes authorizing the convening of three judge courts should be strictly construed. *Id.*, 250-51; *Bailey* v. *Patterson,* 369 U.S. 31, 33 (1962); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128-129 (1965); *Mitchell* v. *Donovan,* 398 U.S. 427, 431 (1970). Direct appeal to this Court deprives the Court of intermediate review by the court of appeals, which can cull from the record the most significant issues worthy of examination. Direct appeal also tends to further burden this Court's already overcrowded docket and gives it less control over the kinds of cases and issues it will address. In short, these special jurisdictional provisions operate as "a serious drain upon the federal judicial system" which "dislocates" its normal functioning. For these policy reasons and for historical reasons—the narrowness of the original scope of these provisions and the carefully constructed amendments to them—these statutes are to be seen "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Phillips* v. *United States, supra.*

Mr. Gonzalez hastens to obtain a ruling from this Court without intermediate appellate review. To what end? The court below has already demonstrated, and the record of this case clearly reveals, that Mr. Gonzalez has no individual stake in the outcome of this case—and certainly no stake demanding of immediate attention. The fact is undisputed: his car was long ago repossessed and resold to an individual not a party to this litigation. No remedy the court can grant now will redound to Mr. Gonzalez's benefit.

Mr. Gonzalez turns § 1253 on its head. Section 1253 was intended to protect a state statute from "improvident doom" at the hands of a federal court. Mr. Gonzalez would skirt intermediate review of procedural issues by a court of appeals in order to hasten a ruling on the constitutionality of a state statute.

B. The designation of the Illinois Secretary of State as a defendant does not satisfy the requirements of 28 U.S.C. §§ 1253 and 2281.

Mr. Gonzalez argues at length that he has asserted a substantial constitutional claim against the Illinois Secretary of State and that the claim against Mercantile is supported by pendent jurisdiction. (Pl. Br., pp. 15-35.) Mercantile considers it inappropriate to argue the merits of the constitutional issue in this indirect manner, since both parties agree that the merits of the constitutional issue are not before the Court on this appeal. Mercantile makes only the limited argument that the claim against the Secretary of State is an indirect attempt to bring pressure upon Mercantile and is inappropriate for a hearing before a three judge court under § 2281 and direct appeal to this Court under § 1253.

Mr. Gonzalez's real dispute has been with Mercantile rather than with the Secretary of State. It was Mercantile which repossessed his automobile and then sold that automobile to a third party. Once his automobile had been repossessed and sold, Mr. Gonzalez had suffered all of the damage he would ever suffer in this situation.

It cannot even be said that the action of the Secretary of State in issuing a repossession title certificate to Mercantile deprived Mr. Gonzalez of any title to the property. Rather the Secretary of State merely recognized a transfer of title which had already taken place. The very Vehicle Code sections which Mr. Gonzalez attacks underscore this point. Sections 3-114(b) and 3-116(b), Ill. Rev. Stat. ch. 95½ (1971), call for action by the Secretary only after the "interest of the owner [has been] terminated or the vehicle [has been] sold," and limit the Secretary's authority to issue a repossession certificate of title only to cases in which the applicant has stated under oath that the prior owner's interest was "lawfully" terminated. Even at that stage, Section 3-114(c), Ill. Rev. Stat. ch. 95½ (1971), carefully deprives that narrow authority of any substantive effect on the parties' rights:

> "The delivery of [the prior owner's certificate of title] pursuant to the request of the Secretary of State does not affect the rights of the person surrendering the certificate, and the action of the Secretary of State in issuing a new certificate of title as provided [in §3-114(b)] is not conclusive upon the rights of an owner or lien holder named in the old certificate."

The sole purpose in suing the Secretary of State was to obtain the convening of a three judge court and to place indirect pressure upon the creditor defendants. This type of stratagem is not intended to be the basis

for the convening of a three judge court. Sections 2281 and 1253 were intended to provide special treatment for a circumstance in which the real parties to the controversy were the plaintiff and the defendant state officials and the entire controversy could be resolved by determining the constitutionality of the acts enforced by the state officials. It was not intended to bootstrap a plaintiff into a right of direct appeal to this Court where the plaintiff's actual controversy is with another private citizen and where an injunction against the state official would not resolve the controversy between the two private citizens.

The requirement of 28 U.S.C. §2281 that an injunction be sought to restrain the "enforcement or execution" of the challenged statute by a state officer "is one of substance, not of form, and it is not satisfied by joining, as nominal parties defendant, state officers whose action is not the effective means of the enforcement or execution of the challenged statute." *Wilentz* v. *Sovereign Camp, W.O.W.*, 306 U.S. 573, 579-80 (1939); *Moody* v. *Flowers*, 387 U.S. 97, 102 (1967). However, as the aforementioned decisions and statutory provisions demonstrate, the Secretary of State is only a "nominal defendant" here. He has no more to do with the validity of repossessions—even of automobiles—than, for example, a court clerk who records a foreclosure deed has to do with the constitutional propriety of the foreclosure sale, *Giordano* v. *Stubbs*, 335 F.Supp. 107, 109 (N.D. Ga. 1971), or a state banking superintendent who licenses lenders has to do with the constitutionality of wage assignments, *Bond* v. *Dentzer*, 325 F.Supp. 1343, 1348-49 (N.D. N.Y. 1971) (motion to convene three judge court denied), 362 F.Supp. 1373 (1973) (merits), *rev'd* 494 F.2d 302 (2d Cir. 1974), *petition for cert. filed sub nom. Bond* v. *Beneficial Finance Co. of New York*, 42 U.S.L.W. 3693 (U.S. June 10, 1974) (No. 73-1848).

Significantly, out of nearly 20 reported federal cases involving the constitutionality of self-help automobile repossessions, none has resulted in the convening of a three judge court and a decision by that court on the merits of the constitutional issue.[3]

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[3]Federal decisions upholding the constitutionality of self-help repossession under Article 9 of the Code (§9-503) include *Adams* v. *Southern California First Nat'l Bank*, 492 F.2d 324 (9th Cir. 1973), *petition for cert. filed*. 42 U.S.L.W. 3693 (U.S. June 7, 1974) (No. 73-1842); *Shirley* v. *State Nat'l Bank*, 493 F.2d 739 (2nd Cir. 1974) (statute similar to U.C.C. §9-503); *Nichols* v. *Tower Grove Bank*, ... F.2d ..... (8th Cir. 1974), summarized at 4 CCH Sec. Tr. Guide ¶52,351, *petition for cert. filed* 42 U.S.L.W. 3703 (U.S. June 19, 1974) (No. 73-1897); *James* v. *Pinnix*, ... F.2d ....., 4 CCH Sec. Tr. Guide ¶52,385 (5th Cir. 1974); *McCormick* v. *First Nat'l Bank*, 322 F. Supp. 604 (S.D. Fla. 1971); *Olla* v. *Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972); *Greene* v. *First Nat'l Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Pease* v. *Havelock Nat'l Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Kirksey* v. *Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Colvin* v. *Avco Fin. Services, Inc.*, 12 U.C.C. Rep. 25 (D. Utah 1973); *Shelton* v. *General Electric Credit Corp.*, 359 F. Supp. 1079 (M.D. Ga. 1973); *Johnson* v. *Associates Finance, Inc.*, 365 F. Supp. 1380 (S.D. Ill. 1973); *Baker* v. *Keeble*, 362 F. Supp. 374 (M.D. Ala. 1973); *Kinch* v. *Chrysler Credit Corp.*, 367 F. Supp. 436 (E.D. Tenn. 1973). Federal decisions holding this provision unconstitutional include *Gibbs* v. *Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973), *appeal pending* (3d Cir., No. 74-1063); *Boland* v. *Essex County Bank & Trust Co.*, 361 F. Supp. 917 (D. Mass. 1973); and *Michel* v. *Rex-Noreco*, 12 U.C.C. Rep. 543 (D. Vt. 1972). In *Michaelson* v. *Walter Laev, Inc.*, 336 F.Supp. 296 (E.D.Wis. 1972), an order to convene a three judge court was entered, but no decision on the merits of the constitutional issue has been reported.

The only decisions other than *Michaelson* considering whether to convene a three judge court were *Gibbs*, which denied a motion to do so, and *McCormick* and the district court in *Adams* (re-

Accordingly, because the Secretary of State is only a nominal party to this action (with so little interest in its outcome that he has not even filed an appearance on this appeal), the requirement of § 2281 that an injunction be sought to restrain the enforcement of a state statute by a state official is not satisfied by Mr. Gonzalez. A three judge court should not have been convened and a direct appeal to this Court does not lie.

II.

THIS CASE IS MOOT.

(Reply to Plaintiff's Brief, pp. 40-56)

A. The facts of record demonstrate Mr. Gonzalez's failure to present a case or controversy to this Court.

Mr. Gonzalez's claims do not present a case or controversy and are moot.

(footnote continued)

ported *sub nom Adams* v. *Egley*, at 338 F. Supp. 614 (S.D. Cal. 1972)), both of which observed that a three judge court was unwarranted in the absence of a state officer party.

In addition to the numerous federal decisions, not all of which are reported, there are numerous state court decisions, reported and unreported, on the merits of the constitutional issue. Two state supreme courts have upheld the Code self-help provisions, *Brown* v. *United States National Bank of Oregon*, ... Ore. ....., 509 P.2d 442 (1973), *Northside Motors of Florida, Inc.* v. *Brinkley*, 282 So. 2d 617 (Fla. 1973), as have lower state courts, *Messenger* v. *Sandy Motors, Inc.*, 121 N.J. Super. 1, 295 A.2d 402 (1972), *Giglio* v. *Bank of Delaware*, ... Del. Ch. ....., 307 A.2d 816 (1973).

Despite the fact that four federal appeals courts and two state supreme courts have sustained the constitutionality of the Code self-help provisions, litigation of the constitutional issue continues, as this appeal demonstrates. The pending petitions for certiorari in *Adams* and *Nowlin* provide a vehicle for prompt resolution of that issue by this Court.

The district court held that Mr. Gonzalez did not have standing to seek injunctive or declaratory relief because his claims were asserted too late for him to benefit from that type of relief. Indeed, at the moment Mr. Gonzalez entered this litigation, his claims for injunctive and declaratory relief did not present a case or controversy. Furthermore, Mr. Gonzalez's claim for damages against Mercantile, the only viable claim he retained at the time he became a party, has concededly since been rendered moot by settlement. (Pl. Br., pp. 6, 54.)

Mr. Gonzalez attacks the practice of self-help repossession and sale of automobiles by creditors without a prior judicial hearing. In his own case, however, the automobile was allegedly repossessed by Mercantile more than five months before he sued Mercantile. The automobile was sold by Mercantile to Motor Sales after notice to Mr. Gonzalez more than three months before Mr. Gonzalez's suit was filed. Moreover, Motor Sales resold the car to a bona fide purchaser (Davis) more than 1½ months before Mr. Gonzalez sought judicial relief. Mr. Gonzalez never joined either Motor Sales or Davis as parties and did not ask for relief restoring his automobile to him.

It is evident that, from the outset of his litigation, Mr. Gonzalez's claims for injunctive and declaratory relief against Mercantile have not presented a case or controversy within the jurisdiction of the federal courts. By reason of Mr. Gonzalez's delay in seeking judicial redress and his failure to join the purchasers of the automobile as parties, no injunctive or declaratory relief could have been awarded which would have afforded Mr. Gonzalez any redress or effective relief for the wrongs he had allegedly suffered.

Mr. Gonzalez also complains of the actions of the Illinois Secretary of State in issuing certificates of title to repossessed automobiles. In his own case, however, the title certificate to the repossessed automobile had been issued to Mercantile on June 16, 1972—3½ months before Mr. Gonzalez entered the lawsuit. Furthermore, by the time Mr. Gonzalez brought suit, the automobile had been transferred twice: from Mercantile to Motor Sales on June 19, 1972; and from Motor Sales to Davis on August 15, 1972. In view of Mr. Gonzalez's delay and his failure to join either of these purchasers as parties, the district court was powerless to grant injunctive or declaratory relief against the Secretary of State which would have revested title in Mr. Gonzalez. Consequently, the claims for injunctive and declaratory relief against the Secretary of State presented no case or controversy from the outset of Mr. Gonzalez's joinder in the lawsuit.

As to the Secretary of State, an additional factor underscores the hypothetical and abstract nature of Mr. Gonzalez's claims. A repossession title to the automobile in question was issued to Mercantile on June 16, 1972, pursuant to an affidavit by Mercantile asserting that Mr. Gonzalez's interest in the automobile had been validly terminated through repossession (A. 48, 51.) The transcript of proceedings indicates that in and prior to June, 1972, the Secretary of State's office followed a practice of issuing repossession titles upon the receipt of such affidavits by creditor. However, between the time of issuance of the repossession title to Mercantile on June 16, 1972 and Mr. Gonzalez's entry into this litigation on September 28, 1972, the Secretary of State adopted a new and drastically different procedure for issuance of certificates of title in repossession situations. See *supra*, pp. 4-6.

In view of the adoption of this new procedure by the Secretary of State in August, 1972, any complaint filed thereafter seeking declaratory or injunctive relief must attack the new procedure and show that the plaintiff has been injured by reason of the application of that new procedure. Instead, Mr. Gonzalez avers only a past injury which allegedly arose under a procedure which the Illinois Secretary of State has not used for almost two years.

Furthermore, it appears that Mr. Gonzalez would not have suffered any injury at the hands of the Secretary of State if the Secretary's August 6, 1972 procedure had been in effect when his car was repossessed and sold. Under the August 6, 1972 procedure, Mercantile would now be required to send Mr. Gonzalez a notice of its intention to apply for transfer of title and advise him of his right to file an affidavit of defense. Presumably, Mr. Gonzalez would have served upon Mercantile an affidavit of defense asserting that he was not in default because of the monies Mercantile had received from the insurance company. Once that affidavit was filed, Mercantile would be unable to present an application which would satisfy the requirements of the Secretary of State. The Secretary of State would, therefore, refuse to issue a new certificate of title to Mercantile without a court order.

It follows, therefore, that when Mr. Gonzalez sued Mercantile on September 28, 1972, the only claim he asserted which was not moot was a complaint for damages against Mercantile for a past and completed transaction. Even that damage claim has now been rendered moot by settlement.

B. This Court's decisions require that the dismissal of Mr. Gonzalez's complaint be affirmed.

The decisions of this Court make it clear that Mr. Gonzalez's claims do not satisfy the "case or controversy" requirements of Article III and are moot. Two recent decisions are particularly in point.

In *Indiana Employment Security Division* v. *Burney*, 409 U.S. 540 (1973), Mrs. Burney's unemployment insurance benefits were terminated by administrative action without a prior evidentiary hearing on the propriety of that termination. She intervened in an existing lawsuit and asserted (on behalf of herself and a class of all present and future recipients of unemployment insurance) that the Indiana procedure was in conflict with the Social Security Act and the due process clause of the Fourteenth Amendment. A three judge court was convened, found the procedure in conflict with the Social Security Act and enjoined its continuance. The three judge court did not reach or decide the due process issue. In the meantime, Mrs. Burney had been pursuing administrative review of procedures within the Indiana Employment Security Division. After the district court's judgment had been entered, she was successful in convincing the Division Review Board to reverse the original termination of ineligibility and to award her full retroactive compensation. This Court, over Mrs. Burney's objection, vacated the judgment and remanded the case to the district court to consider whether it had become moot, stating:

> "The full settlement of Mrs. Burney's financial claim raises the question whether there continues to be a case or controversy in this lawsuit." 409 U.S. at 541.

Mr. Gonzalez's claims are weaker than those of Mrs. Burney. She had a justiciable claim for injunctive relief when her lawsuit was filed and events giving rise to the

claim of mootness occurred only while the case was on appeal. In the case at bar, Mr. Gonzalez's claim for injunctive and declaratory relief was academic at the time he first filed suit.[4]

The application of *Indiana Employment Security Division* v. *Burney* to the case at bar is clear, especially in view of the fact that the dissenters there raised a number of the arguments relied upon by Mr. Gonzalez here. These included (1) a contention that the dispute was capable of repetition because Mrs. Burney might again become employed, then become unemployed, and later have her unemployment benefits suspended through administrative action; (2) the argument that changes in administrative procedures in the Indiana Employment Security Division did not render the case moot because the changes were caused by the litigation and the defendants would be "free to return to [their] old ways" (409 U.S. at 546); and (3) the contention that the case could not be moot because live controversies continued to exist with respect to members of the class which Mrs. Burney sought to represent.

A second controlling decision of this Court is *Dillard* v. *Industrial Commission of Virginia*, 409 U.S. 238 (1972). Mr. Dillard filed a class action on behalf of himself and all other persons similarly situated, challenging the constitutionality of a rule which permitted the temporary suspension of workmen's compensation payments without notice to the complainant and without a prior adversary

[4] Of course, the remand of Mrs. Burney's case to the district court to consider whether the event which occurred during appeal had rendered the case moot was based upon circumstances not applicable in the case at bar. The mootness of Mr. Gonzalez's claims was already discerned by the district court and constituted one of the principal grounds for that court's decision.

hearing. Mr. Dillard's workmen's compensation payments had been suspended pursuant to this rule. A three judge court dismissed the complaint on the merits. *Dillard* v. *Industrial Commission of Virginia*, 347 F.Supp. 71 (E.D. Va. 1972). Mr. Dillard appealed to this Court. His jurisdictional statement disclosed the fact that subsequent to the district court's decision, he had settled his individual workman's compensation claim for a lump sum payment. Although neither party argued the issue of mootness,[5] this Court on its own motion vacated the judgment and remanded the case to the district court to consider whether the case had become moot.[6]

Like *Indiana Employment Security Division* v. *Burney, supra,* and the case at bar, *Dillard* involved a due process claim based upon an asserted right to a prior hearing. In both *Burney* and *Dillard,* the plaintiffs presented a live and proper claim for injunctive relief when the litigation was filed, but their claims were settled or mooted during appeal. Each suit was prosecuted on behalf of an alleged "class", and many of the alleged class members no doubt had exist-

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[5] These facts were ascertained from the examination of the plaintiff's Jurisdictional Statement and defendants' Motion to Dismiss or Affirm.

[6] Thereafter, the district court in an unreported decision, permitted a new plaintiff (Mr. Williams) to intervene and substitute for Mr. Dillard. The district court then reaffirmed and reinstated its prior opinion, dismissing the case on the merits. Upon a further appeal, this Court again vacated the judgment and remanded the case for reconsideration of whether proceedings valid in the Virginia state courts had afforded the plaintiff an adequate state remedy to prevent *ex parte* determination of his workmen's compensation benefits. *Dillard* v. *Industrial Commission of Virginia*, ... U.S. ....., 94 S. Ct. 2028 (1974).

ing claims which were not moot. In both *Burney* and *Dillard*, the defendants were "free to return to [their] old ways." In each of those cases, the controversy involving the named plaintiff was "capable of repetition." However, in both cases, this Court treated the settlement with named plaintiffs as grounds for vacating the lower court's judgments and remanding for a determination of mootness. The same result is clearly indicated in the case at bar, although no remand is necessary because no case or controversy involving injunctive or declaratory relief existed while the case was in the trial court and this was one of the grounds for the district court's judgment of dismissal.

C. Mr. Gonzalez's arguments that his claims are not moot are rebutted by the undisputed facts and by this Court's prior decisions.

Mr. Gonzalez makes four arguments against the conclusion that the dismissal of his claims should be affirmed on the ground that they have become moot. None withstands analysis.

1. Assuming the mootness of any request for injunctive relief, Mr. Gonzalez argues that this mootness does not infect his claim for declaratory judgment and that the possibility of repetition of the transaction precludes a conclusion that declaratory relief is barred by mootness. (Pl. Br., pp. 42-48). This argument is without merit.

In the first place, a declaratory judgment claim is as susceptible of mootness as a claim for injunctive relief. The Declaratory Judgment Act, 28 U.S.C. §2201, requires that a case or controversy exist before a declaratory judgment may issue. Even if that Act did not so provide, the continuing existence of a case or controversy would still be

required. The federal judiciary's lack of jurisdiction to review moot cases arises directly from the requirement of Article III of the Constitution, which makes the exercise of judicial power dependent upon the existence of a case or controversy. *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403, 407 (1972); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The existence of a case or controversy becomes especially important where the constitutionality of a state statute is under attack because "the power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision . . . ." *Younger* v. *Harris*, 401 U.S. 37, 52 (1971); *Steffel* v. *Thompson*, ... U.S. ....., 94 S.Ct. 1209, 1224 (1974) (Burger, C. J. and Stewart, J., concurring).

To determine whether this case is moot, the Court must inquire as to whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. *Super Tire Engineering Co.* v. *McCorkle*, ... U.S. ....., 94 S.Ct. 1694, 1698 (1974); *Steffel* v. *Thompson*, *supra*, at 1216; *Golden* v. *Zwickler*, 394 U.S. 103, 108 (1969). A live and acute controversy must be existing and must continue to exist at all stages of review. *Steffel* v. *Thompson*, *supra*, 1216; *Golden* v. *Zwickler*, *supra*. For purposes of determining whether this action is moot, the Court must review the judgment below as the record of this case now stands, not as it once stood. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969).

Mr. Gonzalez has not demonstrated any continuing controversy between himself and Mercantile nor has he shown that the recurrence of a controversy is more than extremely

remote. His Amended Complaint contains no allegations that he intends to buy a new car. Although he argues that it is likely that he will buy a new car, for this case or controversy to recur between these parties, the following conjunction of events will have to recur: Mr. Gonzalez will have to (1) purchase a new car, (2) on a retail installment contract, (3) with Mercantile, (4) that does not have a provision requiring a hearing prior to repossession, and (5) default on his loan payments. Five events must therefore recur in order for this case or controversy to be presented again between these parties. So remote a possibility of recurrence cannot resurrect an otherwise mooted claim. *Oil Workers Union* v. *Missouri*, 361 U.S. 363 (1960); *Harris* v. *Battle*, 348 U.S. 803 (1954); *Ihrke* v. *Northern States Power Co.*, 459 F.2d 566 (8th Cir.), *vacated* 409 U.S. 815 (1972); *Kerrigan* v. *Boucher*, 450 F.2d 487 (2d Cir. 1971). Constitutional questions must be presented in the context of a specific, live grievance; hypothetical threats are not sufficient. Cases where declaratory relief is sought, like any other cases, require concrete legal issues, presented in actual cases, not mere hypothetical fact situations and abstractions. *Golden* v. *Zwickler*, 394 U.S. 103, 110 (1969). The case at bar is no exception to this constitutional requirement.

The cases relied upon by Mr. Gonzalez all presented a justiciable controversy for declaratory and injunctive relief by the named plaintiff when they were filed.[7] In each

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[7] One authority principally relied upon by Mr. Gonzalez, *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969), belongs in a special category of cases "capable of repetition, yet evading review", in which this Court has relaxed normal mootness requirements. However, the case at bar does not present a situation "evading review". Numerous cases have ruled on the issue of constitutionality of §§ 9-503 and 9-504 of the Uniform Commercial Code. *See* reported cases

of these cases, the alleged mootness of the named plaintiffs' claims arose because of events which took place while the plaintiff's claim was pending in the trial court or on appeal. In the case at bar, there was no case or controversy for injunctive or declaratory relief when Mr. Gonzalez joined this lawsuit on September 28, 1972. Cases setting forth relaxed standards where mootness has resulted from subsequent events cannot sustain a claim which did not present a case or controversy when it was filed.

2. Mr. Gonzalez argues that even if his controversy with Mercantile no longer continues and has become moot, he has a continuing controversy with the Secretary of State which will recur whenever he buys a new car, when he defaults on the payment on that car, and when the car is repossessed. Again, such an argument assumes the simultaneous occurrence of a number of contingencies.

Plaintiff relies upon this Court's decision in *Zwickler* v. *Koota,* 389 U.S. 241 (1967). However, in a subsequent appeal involving the same litigation, *Golden* v. *Zwickler,* 394 U.S. 103 (1969), this Court declared the case moot. In the interval, the congressman who was the target of Mr. Zwickler's anonymous handbills, had accepted a 14-

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(footnote continued)

cited in note 3 *supra* and cases, reported and unreported, cited in *Gibbs* v. *Titelman,* 369 F.Supp. 38 (E.D. Pa. 1973), *appeal pending* (3d Cir. No. 74-1063). Moreover, since the filing of appellant's brief (on May 13, 1974), two petitions for certiorari have been filed with this Court raising precisely that question on an appropriate record. *Adams* v. *Southern California First National Bank,* No. 73-1842 (filed June 7, 1974); *Nowlin* v. *Professional Auto Sales, Inc.,* No. 73-1897 (filed June 19, 1974). The pendency of these petitions before this Court refutes the claim that the question of the constitutionality of §§9-503 and 9-504 presents a situation capable of repetition, yet evading review.

year term as a Justice of the Supreme Court of New York. The improbability of a repetition of another dispute with the congressman rendered the case moot, even though the New York law prohibiting the distribution in quantity of anonymous handbills remained on the statutes, presumably enforced by the same New York officials. Similarly, the improbability of a repetition of Mr. Gonzalez's dispute with Mercantile renders this case moot despite the continuing role of the Illinois Secretary of State in connection with the issuance of automobile certificates of title.

No matter how remote the continuing controversy between Mr. Gonzalez and the Secretary of State, it is clear that the new procedures adopted by the Secretary of State pursuant to a court hearing, with the approval of plaintiff's counsel, render this case moot. *S.E.C.* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972).

Plaintiff argues that the Secretary of State is "free to return to his old ways." (Pl. Br., pp. 48-51.) However, since the Secretary's new procedures have been in effect for almost two years, this possibility is certainly remote.[8]

In any event, the decisions of this Court clearly indicate that the absence of a continuing "case or controversy" in-

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[8] Mr. Gonzalez cites *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968), in support of his claim that the Secretary of State's new procedures do not render this case moot. That case is clearly distinguishable from the case at bar. There an association of defendants decided to dissolve itself, but the individual defendants remained in existence. The new regulations adopted by the Government leading to the Association's dissolution did not apply to all contracts entered into by the Association and, therefore, the case or controversy as to some contracts remained. In the case at bar, the regulations adopted by the Secretary of State apply to all applications for repossession titles.

volving the plaintiff cannot be cured merely by an allegation that state officials are continuing to enforce the challenged statutes or that they may resume enforcement at any time. *See, e.g., Indiana Employment Security Division* v. *Burney,* 409 U.S. 540 (1973); *Dillard* v. *Industrial Commission of Virginia,* 409 U.S. 238 (1972); *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

The Secretary of State, plaintiff's "three judge defendant" represented by the Attorney General of Illinois, has so little at stake in the outcome of this controversy that he has not participated in this appeal. That is further proof that a case or controversy does not continue to exist in which each of the parties has an adverse interest. See *Kerrigan* v. *Boucher,* 450 F.2d 487, 489 (2d Cir. 1971).

3. Mr. Gonzalez also argues that because this case was filed as a class action, a mooting of the controversy between the named plaintiff and the opposing parties does not necessarily moot the entire case. Mr. Gonzalez contends that this Court has never explicitly decided this issue. (Pl. Br., p. 52.) This contention is in error.

As noted *supra,* pp. 27-30, this Court remanded *Indiana Employment Security Division* v. *Burney, supra,* and *Dillard* v. *Industrial Commission of Virginia, supra,* on mootness grounds. Both cases were brought as class actions and were mooted when the named plaintiff settled with defendant. The same result was reached in *O'Shea* v. *Littleton,* ..... U.S. ....., 94 S.Ct. 669, 675 (1974), where the Court held that "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *Accord, Bailey* v. *Patterson,* 369 U.S. 31, 32-33 (1962). Because Mr. Gonzalez, as the only one of the

named plaintiffs pressing this appeal, does not have an existing case or controversy with Mercantile, he may not salvage this litigation by relying on the position of other members of the alleged class who may or may not have an existing case or controversy with Mercantile or the Secretary of State.[9]

4. Finally, Mr. Gonzalez contends that the payment of monetary damages claimed against Mercantile does not affect his claim against the Secretary of State. *MacQueen* v. *Lambert*, 348 F.Supp. 134 (M.D. Fla. 1972), cited in support thereof, is inapposite. The district court held that settlement of a damage claim against one defendant did not moot a damage claim against another defendant. In the case at bar, Mr. Gonzalez claimed damages against Mercantile only. His claim against the Secretary is for injunctive and declaratory relief only. Accordingly, since the Secretary of State has instituted new procedures for issuing certificates of title to repossessing creditors, this case is moot.

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[9] Nor does the recently decided *Richardson* v. *Ramirez*, ... U.S. ....., 42 U.S.L.W. 5016 (June 25, 1974) support Mr. Gonzalez's argument. There the Court carefully distinguished California class action rules from Federal procedure:

> "We have held that in the federal system one may not represent a class of which he is not a part, *Bailey* v. *Patterson*, 369 U.S. 31, 32-33 (1962), and if this action had arisen in the federal courts there would be serious doubt as to whether it could have proceeded as a class action on behalf of the class of ex-felons denied the right to register after the three named plaintiffs had been granted that right. *Indiana Employment Security Commission* v. *Burney*, 409 U.S. 540 (1973)." *Richardson* v. *Ramirez*, *supra*, 5020.

D. The dismissal of this case for lack of a case or controversy will not bar judicial review of the Code's self-help repossession provisions.

Although the underlying merits of this litigation—the question of the constitutionality of the Code's self-help repossession provisions—are not presented on this appeal, the dismissal of this case for lack of a case or controversy will not bar judicial review of these provisions. The question of the constitutionality of these provisions are involved in litigation filed nationwide, in both federal and state courts, reported and unreported. See note 3, *supra*, p. 22. Although four federal appeals courts and two state supreme courts have now sustained the constitutionality of the Code's self-help provisions, litigation of the constitutional issue continues.

Indeed, the question of the constitutionality of these provisions is presented to this Court by two petitions for certiorari filed in June, 1974: *Adams* v. *Southern California First National Bank*, 492 F. 2d 324 (9th Cir. 1973), *petition for cert. filed* 42 U.S.L.W. 3693 (U. S. June 7, 1974) (No. 73-1842); *Nowlin* v. *Professional Auto Sales, Inc.*, ... F.2d ..... (8th Cir. 1974) summarized at 4 CCH Sec. Tr. Guide ¶52,351, *petition for cert. filed* U.S.L.W. 3703 (U.S. June 19, 1974) (73-1897). Both of these cases present the issue on an appropriate record after careful review by the respective courts of appeal. Accordingly, although appellee Mercantile firmly believes that the decisions of the respective courts of appeal are correct, it respectfully urges this Court to grant certiorari in either or both cases to decide the constitutional issue and end the nationwide litigation.

III.

MR. GONZALEZ HAS NO STANDING TO CONTEST THE CONSTITUTIONALITY OF THE UNIFORM COMMERCIAL CODE'S REPOSSESSION PROVISIONS.

(Reply to Plaintiff's Brief, pp. 35-40)

The district court correctly denied Mr. Gonzalez standing to challenge the constitutionality of the Uniform Commercial Code's repossession provisions. As his own Amended Complaint reveals, Mr. Gonzalez suffered no injury as a result of the operation of those provisions.

A. Mr. Gonzalez was harmed, if at all, by the violation of the Code repossession provisions and his failure to obtain redress under the Code for such violation.

Section 9-503 of the Code permits the creditor to take possession of the collateral only when the debtor is in default. Section 9-504 authorizes the creditor to resell or otherwise dispose of collateral so repossessed but requires the creditor to give the debtor reasonable notice of the intended resale.[10] If the secured party takes possession of the collateral when the debtor is not in default, he violates §9-503 of the Code. In such case §9-507 permits the debtor to obtain a court order restraining the creditor from disposing of the collateral.[11]

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[10] Reasonable notice is not required if the collateral is perishable, threatens to decline speedily in value, or is of a type customarily sold on a recognized market. Ill.Rev.Stat., ch. 26, §9-504(3) (1973). In the case at bar Mercantile did not rely on any of these exceptions but sent Mr. Gonzalez notice of its intention to resell the car. (A. 44.)

[11] This section provides that "If it is established that the secured party is not proceeding in accordance with the provisions of this Part disposition may be ordered or restrained on appropriate terms and conditions." Ill.Rev.Stat., ch. 26, §9-507(1) (1973). This provision was effective at all times material to this case.

In his Amended Complaint, Mr. Gonzalez avers that he was not in default when his car was repossessed. Although he concedes that he missed at least one payment on the automobile prior to its repossession, he asserts that Mercantile received an amount in excess of that unpaid installment when it collected insurance proceeds after the car was twice damaged in accidents.[12] Accordingly, Mr. Gonzalez concludes that "at the time of repossession, Mercantile Bank had received an amount in excess of the payments then due and owing on the contract." (A. 26-27.)

For purposes of ruling on the motion to dismiss, the district court properly accepted the allegations pleaded in Mr. Gonzalez's Amended Complaint at face value and assumed that he was not in default at the time of the car's repossession. *California Transport* v. *Trucking Unlimited*, 404 U.S. 508, 515 (1972). Because Mr. Gonzalez was not in default at the time of repossession and §§ 9-503 and 9-504 authorize repossession and resale of collateral only upon the debtor's default, the district court assumed that Mercantile had acted in breach of §§ 9-503 and 9-504 when it repossessed the car. The court concluded that Mr. Gonzalez was harmed, not by the operation of §§ 9-503 and 9-504, but by the violation of those provisions. 363 F.Supp. 143, 144-45.

The district court's finding is buttressed by Mr. Gonzalez's position with respect to § 9-507. That section

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[12] Mr. Gonzalez alleges that his car was repossessed on April 25, 1972, and that he paid the February 28, 1972, installment on the car. His next payment of $120.78 was due on March 28. As a result of damage to the car sustained in two accidents, Mercantile received insurance proceeds of $322.68 and a rebate from the insurance company of $229.94. (A. 26-27.)

of the Code permitted Mr. Gonzalez to sue for damages for the breach of §§ 9-503 and 9-504, which he did.[13] That section, as noted above, also permitted him to obtain an order from an Illinois court restraining Mercantile from disposing of the automobile. Although he knew of the repossession and of Mercantile's intention to dispose of the car,[14] Mr. Gonzalez never sought such a restraining order. Almost two months elapsed following the car's repossession before Mercantile turned possession of the car over to Motor Sales, which did not dispose of the car until almost two months thereafter. Despite advance notice of intended resale and ample time between the car's repossession and sale, Mr. Gonzalez made no effort to obtain an order restraining sale, which §9-507 explicitly authorized. Mr. Gonzalez suffered the "irreparable" harm of the loss of his automobile only by his own inaction.

B. Because Mr. Gonzalez was not injured by the operation of the Code's repossession provisions, he lacks standing to challenge the constitutionality of those provisions.

In barring Mr. Gonzalez from asserting his constitutional claim for want of standing, the district court invoked a rule repeatedly adhered to by this Court as a

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[13] Mr. Gonzalez brought another case in state court against Mercantile, Motor Sales and others claiming over two million dollars in damages arising out of the very same repossession which is the subject matter of this appeal. (Gonzalez v. Chicago, Ill. Motor Sales, Inc., et al., No. 73 L 4903, Circuit Court of Cook County, Ill.) Included among his causes of action in that lawsuit was a claim that Motor Sales had violated §9-504 of the Code; he sought damages for this violation pursuant to §9-507. This was settled as to Mercantile and Motor Sales.

[14] See pp. 8-9, *supra*.

threshold requirement of standing—the action challenged as unlawful must cause a specific injury to the complaining party if he is to possess standing to raise that challenge. *Schlesinger* v. *Reservists Committee to Stop the War,* ..... U. S. ....., 42 U.S.L.W. 5088, 5092 (June 25, 1974); *O'Shea* v. *Littleton,* ..... U.S. ....., 94 S.Ct. 669, 675 (1974); *Sierra Club* v. *Morton,* 405 U.S. 727, 738 (1972).

This rule was applied in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 165-71 (1972), where a black guest of a lodge member was refused service in the lodge's dining room. The guest brought suit, challenging both the discriminatory membership policy and the lodge's discriminatory policy of refusing to serve black guests of its members. The Court held that he lacked standing to challenge the membership policy because he had not applied for membership and accordingly was not injured by the membership policy. The Court explained that

> "any injury to appellee from the conduct of Moose Lodge stemmed, not from the lodge's membership requirements, but from its policies with respect to the serving of guests of members. Appellee has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Id.,* 166.

In the case at bar, Mr. Gonzalez attacks the constitutionality of a statute, the operation of which has not caused him injury. To the contrary he was protected by the statute, which precluded repossession in the absence of default. He did not enjoy the benefit of that protection only because of his own inaction—e.g., he failed to obtain a court order restraining resale of the car, permitted by § 9-507(1) in the event of a violation of the repossession provisions.

The rule invoked by the district court in this case—that the action challenged as unlawful must cause a specific injury to the complaining party—serves two functions.

First, it insures that the complainant will authoritatively present to the Court "a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Schlesinger* v. *Reservists Committee to Stop the War,* ..... U.S. ....., 42 U.S.L.W. 5088, 5092 (June 25, 1974). Without a specific injury to the complainant stemming from the action challenged, a court will necessarily find itself relying upon conjecture as to the effects of the challenged action. *Id.; Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 165-171 (1972). In this case, to determine whether sections 9-503 and 9-504 should be declared unconstitutional, this Court would have to speculate on what adverse consequences flowed from the operation of those provisions on debtors in default. Mr. Gonzalez is not able to show any adverse consequences of the operation of §§ 9-503 and 9-504 on himself and other debtors not in default because those statutes served to protect them from repossession. The only injury suffered by Mr. Gonzalez arose from his own failure to seek the protection of §§ 9-503 and 9-504 by obtaining an order restraining resale provided by § 9-507. Having spurned the protection afforded by § 9-507, Mr. Gonzalez cannot now present to this Court a record on which it can weigh the effectiveness of safeguards already built into the Code. If Mr. Gonzalez had sought the order restraining resale permitted by § 9-507, even if that order were denied, this Court would at least have been presented with a complete record which would enable it to weigh the adequacy of due process protection presently provided

by § 9-507 (assuming, *arguendo,* state action under § 9-503).[15]

Secondly, the rule invoked by the district court to deny Mr. Gonzalez standing functions to avoid unnecessary constitutional decisions.

> "When a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudicaton does not take place unnecessarily."

Schlesinger v. *Reservists Committee to Stop the War, supra,* 42 U.S.L.W., at 5092; *see Peters* v. *Hobby,* 349 U.S. 331, 338 (1955); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610-11 (1973).

In *Schlesinger,* the Court cited two reasons for invoking the concrete injury requirement to avoid an unnecessary constitutional decision. First, it insures that the individu-

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[15] Appellant Gonzalez broadly asserts that any court determination of the validity or invalidity of repossession subsequent to the repossession does not change the unconstitutionality of the original act. In support of this contention he quotes extensively from *Fuentes* v. *Shevin,* 407 U.S. 67 (1972) and *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). Pl. Br. p. 37-40.

Those cases have been limited by *Mitchell* v. *W. T. Grant Co.,* ..... U.S. ....., 94 S.Ct. 1895 1902 (1974) where the Court held that *Sniadach* and *Fuentes* did not, where both parties had an interest in personal property, require a hearing before one party's possession of the property is in any way disturbed and that due process requirements are satisfied if an opportunity for a hearing and a judicial determination is provided, whether before or after loss of possession.

Accordingly, Mr. Gonzalez's broad assertion that post-repossession remedies are totally without constitutional significance is no longer a correct statement of the law, if it ever was.

al need of the complainant requires the remedy which he requests. Secondly, this requirement insures the fashioning of relief precisely tailored to the facts to which the court's ruling would be applied. In *Schlesinger,* this Court was particularly anxious to avoid overbroad remedies where one branch of the Federal government was to review the action of a coordinate branch.

The case at bar presents an even more compelling set of facts on which to avoid an unnecessary constitutional decision. Mr. Gonzalez seeks sweeping relief from a Federal court striking down a fundamental provision of a carefully drafted uniform chattel security law adopted in 49 states, the District of Columbia and the Virgin Islands.[16] He seeks this landmark ruling even though his individual need no longer requires the remedy for which he asks. Because he failed to obtain a timely order restraining resale either pursuant to § 9-507 or from the Court below, no remedy can now be fashioned which will give Mr. Gonzalez relief.

Mr. Gonzalez argues that he seeks injunctive and declaratory relief not only for himself but also on behalf of all persons whose cars have been repossessed for an alleged default without prior notice or an opportunity to be heard. He thereby subsumes into one purported class both persons who are in default and persons who are not in default at the time of repossession. Persons in default

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[16] "The respective rights of the parties in secured transactions have undergone the most intensive analysis in recent years. . . . I am content to rest on the judgment of those who have wrestled with these problems so long and often and upon the judgment of the legislatures that have considered and so recently adopted provisions" such as §9-503. *Fuentes* v. *Shevin,* 407 U.S. 67, 103 (1972) (White, J., dissenting).

at the time of repossession could not obtain an order preventing resale provided by § 9-507.[17] Assuming, *arguendo*, that such persons might be injured by the operation of §§ 9-503 and 9-504 insofar as repossession and sale is permitted without the protection of § 9-507, their injury does not give Mr. Gonzalez standing to seek redress on their behalf, any more than the evicted guest in *Moose Lodge* had standing to assert the rights of black applicants denied membership. *Moose Lodge No. 107* v. *Irvis*, *supra*, 407 U.S., at 166; *O'Shea* v. *Littleton*, *supra*, 94 S.Ct., at 675-76.

Mr. Gonzalez argues that if a debtor not in default is held to lack standing to challenge §§ 9-503 and 9-504, then he will be worse off than a person who is in default, who would have standing to demand a hearing prior to repossession. This argument assumes that *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), requires a hearing prior to repossession for persons whose goods are reclaimed under the Code repossession provisions. Last term, this Court explicitly shunned any expression of its views on the necessity of a hearing prior to repossession pursuant to §§ 9-503 and 9-504, warning that "the uncertainty evident in the current debate suggests caution in the adoption of an inflexible constitutional rule." *Mitchell* v. *W. T. Grant Co.*, ... U.S. ....., 94 S.Ct. 1895, 1906 (May 14, 1974). Consequently it is impossible to compare the rights of persons in default with persons not in default since this Court has explicitly refrained from adopting "an inflexible constitutional rule" as to the former.

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[17] Repossession of a car of a debtor in default would not violate §§ 9-503 and 9-504. The remedies of §9-507 are only available when §§ 9-503 or 9-504 is violated.

The case at bar clearly should be disposed of on non-constitutional grounds. Although Mr. Gonzalez seeks a sweeping declaration that §§ 9-503 and 9-504 are unconstitutional, his Amended Complaint alleges a breach of the very statutes he would strike down. The only injury he suffered arose from his failure to seek the protection of those statutes. Accordingly, he has no standing to contest their constitutionality.

CONCLUSION

For the reasons stated, appellee Mercantile National Bank of Chicago requests that this appeal be dismissed for want of jurisdiction or, in the alternative, that the judgment of the district court be affirmed.

Respectfully submitted,

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